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No. 99-678

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

KATHLEEN CRANDALL
Petitioner,
vs.

LISA WAGNER
Respondent.

On Writ of Certiorari to the
California Court of Appeal
First Appellate District

MOTION FOR LEAVE TO FILE BRIEF and AMICI CURIAE BRIEF OF LEGAL ADVOCATES FOR CHILDREN AND YOUTH, AND DR. ELEANOR WILLEMSEN IN SUPPORT OF THE PETITIONER

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Pursuant to Rule 37.2 of the Rules of this Court, the Legal Advocates for Children and Youth (LACY), and Dr. Eleanor Willemsen, respectfully move this Court for leave to file the accompanying brief. Petitioner Crandall has granted consent to the filing of this brief. Respondent Wagner has not.

The case before the Court concerns the rights of two children raised by a lesbian couple to continue to have a relationship with the woman who is not their natural mother. The California Court of Appeal, while recognizing that it may

be in the best interests of these children to continue a relationship with the woman who helped raise them for many years, said it had no jurisdiction to order visitation because there was no grounds for setting up a guardianship. Previous California decisions have rejected all other possible means of protecting children's rights in this situation, thus leaving the children with a right but no method of protecting that right.

Legal Aid for Children and Youth, an agency of the Santa Clara County Bar, is an agency devoted to protecting the rights and interests of children. It appeared as an amicus curiae in this case before the California Court of Appeal for the First Appellate District. Dr. Eleanor Willemsen, a Professor of Child Psychology at Santa Clara University, has written extensively on the importance of parent-child attachments and the need for legal protection of those relationships. She and other child psychologists submitted a letter brief to the California Supreme Court asking that it grant review in this case. A more detailed discussion of the interests of applicants is set out in part I of the attached brief.

The proffered brief amici curiae in support of the petition will address three matters:

(1) It will explain the psychological basis for finding that children need and should have a right to maintain established relationships with de facto parents, a matter not addressed in the petition itself or the opinion below. We believe an understanding of the importance of such relationships to the emotional and intellectual development of the children, and its effect upon their ability to maintain intimate relationships in their adult life, is crucial to understanding the legal issues involved

in this case.

(2) It will review the United States Supreme Court authority for finding the children's right to maintenance of a bond with de facto parents is a right to be of constitutional stature, and thus one that cannot be taken without due process of law.

(3) It will explain how the denial of protection to this right for children raised in a same-sex household, while protecting that right for other children, is a distinction analogous to that between illegitimate and legitimate children condemned in Levy v. Louisiana, 391 U.S. 68 (1968), and a denial of the equal protection of the laws. Items 2 and 3 are addressed in the petition for certiorari, but the proposed amicus brief adds considerable analysis and authority.

Applicants therefore request that the Court grant leave for them to file the attached amicus brief in support of petitioner Kathleen Crandall.

Respectfully submitted,

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IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

Legal Advocates for Children & Youth (LACY) is one of five programs of the Santa Clara County Bar Association Law Foundation. LACY was started in 1990 to address the unmet legal needs of the youth of Santa Clara County. Since 1990, LACY has provided free legal and related social services to over 6,500 youth, as well as legal education and training to over 2,500 attorneys, service providers, teachers, youth, and parents.

LACY is interested in Crandall v. Wagner because of our belief that children should have the right to have relationships with their care givers, whether the relationships have been legally sanctioned or not. We have worked with several youth that have been prevented from having a relationship with adults who played important roles in their lives because of a parent's unwillingness to allow a continued relationship. The results were devastating for the youth. We believe that a favorable outcome in Crandall v. Wagner will protect a child's interest in maintaining relationships to those who are important, though unrelated to the child.

Dr. Eleanor Willemsen is a Professor of Psychology at Santa Clara University in Santa Clara, California. She has written extensively on the importance of the bond between a child and its care givers, and the need for legal protection of the bond. (See Boccaccini & Willemsen, *Contested Adoption and*

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

the Liberty Interest of the Child, 10 St. Thomas L. Rev. 211 (1988).) She has appeared as amicus in California cases involving attachments between children and prospective adoptive parents. Dr. Willemsen believes that a decision establishing the constitutional stature of a child's right to maintain a bond with a parental figure will result in lower court decisions that will better promote the interests of children.

SUMMARY OF THE ARGUMENT

California recognizes that both state and federal constitutions provide a fundamental right of a child to maintain a bond with persons "who have provided daily parental concern, affection, and care over substantial time." (In re B.G., 11 Cal.3d 692 (1974).) (We refer to it in this brief as a "right to nurture.") California cases recognizing this right to be of constitutional statute include In re Zachary H., 73 Cal. App.4th 51, 63 (1999) and In re Bridget R., 41 Cal.App.4th 1483, 1502 (1996).)[2] Its statutes permit the court to grant "reasonable visitation rights" to any person "having an interest in the welfare of the child." (Cal. Fam. Code, § 3100.) But to obtain visitation, the person seeking it must bring some proceeding before the court giving the court subject matter jurisdiction, and the decision of the California Court of Appeal in this and precedent cases hold that there is no proceeding in the California array under which a psychological parent in a same-sex relationship, or his or her children, can enforce their fundamental right.

The right cannot be protected in an action for dissolution of marriage, or under the statute providing for step-parent

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[2] The United States Supreme Court has never decided that issue. (In re Michael H., 491 U.S. 110, 130 (1989).)

visitation (see Cal. Fam. Code, § 3101) because the parents cannot marry. It cannot be protected in a paternity action or under the Uniform Parentage Act, because Crandall does not claim to be the "natural" father or mother of the children. (West v. Superior Court, 59 Cal.App.4th 302, 306 (1997).) It cannot be protected in a juvenile court proceeding, because neither respondent nor the children have done anything that would cause the juvenile court to take jurisdiction over the children. The courts have ruled out an independent action based either directly on section 3100 (Curiale v. Reagan, 222 Cal.App.3d 1597, 1600 (1990).), on principles of equitable estoppel (Nancy S. v. Michele G., 228 Cal.App.3d 831, 839 (1991)), loco parentis (Id. at 838) or breach of a contract to raise the children together (West v. Superior Court, supra, 59 Cal.App.4th 302, 308). Finally, in this action the court rejected the remedy of guardianship on the ground that a guardianship cannot be established solely to permit visitation.[3]

As becomes clear from the language of the cases, the decisions do not rest on the failure of the petitioner to discover the appropriate form of action, or on a theory that the legislature by happenstance did not provide it. They rest on the courts' belief that the Legislature as a matter of public policy has decided deliberately not to make available to same-sex parents remedies that it has made available to opposite-sex parents. (See, Curiale v. Reagan, supra, 222 Cal.App.3d 1597, 1600-1601; West v. Superior Court, supra, 59 Cal.App.4th 302, 306-307.)

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[3] If there were a pre-existing guardianship, established for some other reason, petitioner might have been able to raise an issue of visitation. (See Guardianship of Martha M., 204 Cal.App.3d 909 (1988).)

But whatever one's view on public policy, the state cannot express its disapproval of the lesbian life style **by taking it out on the children**. We submit that California, having recognized that all children have a fundamental constitutional right to nurture, cannot deny that right to some children based on the marital status or sexual orientation of the parents. (See Levy v. Louisiana 391 U.S. 68 (1968) [state policy to discourage having children out of wedlock cannot be implemented by denying wrongful death benefits to illegitimate children.])

The California practice denies the children of same-sex parents their right to nurture by denying such children due process, or any process, by which to enforce that right. Because the state extends due process to other children, based on the marital status or sexual orientation of their parents, the state denies the equal protection of the laws in a very literal sense: the state protects the right to nurture of most children, but not those of same-sex relationships.[4]

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[4] It might extend protection if the child is mistreated or otherwise comes within the purview of the juvenile court, but such a requirement is not imposed as a jurisdictional prerequisite to protection of other children.

In this amicus brief we hope to do the following:

1. Explain the psychological basis for the concept that the right to nurture is important, and of fundamental character.

2. Explain that this right of constitutional stature, and entitled to protection under the due process clause.

3. Explain in further detail how the California statutes, as construed by its courts, denied the children in this relationship the equal protection of the laws.

I. THE DISRUPTION OF AN ATTACHMENT BETWEEN A CHILD AND HIS OR HER PSYCHOLOGICAL PARENT HARMS THE CHILD'S EMOTIONAL AND INTELLECTUAL MATURATION AND HIS OR HER ABILITY TO FORM AND MAINTAIN INTIMATE RELATIONSHIPS AS AN ADULT.

Intimate relationships with others are the context in which we discover who we are, learn how others feel about life's important issues, and find out how to bridge differences. The emotional security and warmth derived from a close relationship with a loving parent provides us with a "home base" from which we can venture to take the risks that are inevitably part of a life of joy and accomplishment. In short, close, psychologically intimate relationships between children and their care givers are central to human life.

The longing that we all feel for intimate closeness with another human being is moderated, often greatly, by the competing need for autonomy and separateness. Attachment theorists regard this tension between the needs for closeness and autonomy as the central dilemma of human life. The theory, as expressed in the writings of John Bowlby[5], develops the interplay between attachment and independence. A satisfying close relationship with a nurturing care giver — a secure attachment — provides the base of operations from which a toddler can venture forth into independent activity.

Throughout the life span, one continues to feel rival tugs of closeness and autonomy. If we begin life with an experience of successful closeness, we are not only better able to create

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[5] 1 John Bowlby, Attachment and Loss (1969).

closeness in our relationships with friends and partners, but we are also more equipped to take the risks involved in having a sphere of separateness for ourselves. Both of these are essential for mental health and productive functioning.

An important product of the relationship of attachment with a psychological parent is the establishment of a mental representation,[6] an image of the self as someone who is and can be cared for and loved. A reciprocal part of the representation is an image of the mother caring for the child. In attachment theory, this mental model of the attachment relationship is carried forward in development and is the foundation for either our faith in love's possibility, or our doubts about that very issue.

Once we form a clear mental representation of self and care giver in relationships, we no longer need the concrete physical reassurance the younger child needs. Instead, we can carry a mental image inside us as we explore, go to school, meet new people, and so forth. Thus, internalization of a close emotional bond actually facilitates our growing independence. The mental model is also the foundation of our capacity to form, sustain, and commit to close relationships in the future.

This working model forms the mental basis for the continuing influence of the early nurturing relationship over the rest of development. It is of particular importance in the earlier years, when the existence of a secure attachment facilitates the child's ability to mature emotionally and intellectually. But it is also important for adolescents and pre-adolescents such as the

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[6] Carol George et al., The Adult Attachment Interview (1985) *(on file with University of California, Department of Psychology, Berkeley.)*

children in this case.

Adolescence is a critically important time in development when young people prepare to separate from their parents and become independent adults. The fundamental challenge for adolescents is, in fact, the same one toddlers deal with: how to sustain the close relationships that have nurtured them while at the same time becoming separate independent adults. Only at adolescence, the individual's ability to think about this dilemma is much more sophisticated than a toddler's. Psychologists describe the developmental task of adolescence as the formation of a sense of identity.

Identity is complex in our society and it is achieved after a long process by which the individual comes to see himself/herself as a separate person who is nonetheless still connected to important others such as the psychological parent. A history of secure attachment — with all that it has facilitated in earlier development — provides the mental and emotional foundation that enables the adolescent to tolerate the stress entailed in the process and go on to achieve a firm sense of personal identity. Evidence supports the idea that the security of adolescents' attachments predicts their adjustment among their peers, their internalization of moral values, and their success in relationships with their peers.

Respected identity theorist Erik Erikson argues that this achievement of a secure sense of personal identity provides the foundation for new and more psychologically intimate relationships such as the romantic relationships and parent-child relationships the young adult will now be developing. Evidence confirms his argument. Adults with secure attachment histories indeed do have more successful romantic relationships and more

success in other kinds of relationships as well.[7]

The bond of attachment provides the basis for a child to grow up believing that he is loved and can love. This faith is embodied in the child's mental representation of the experience of being in relationships — the "internal working model of attachment" — and it is carried within the child's mind and heart as a tool for successful engagement with other people throughout the life span. These "successful engagements" include peer relationships at all ages, relationships with other important adults like teachers and coaches, and, eventually, romantic relationships and becoming a successful parent oneself. The security afforded by the secure relationship also serves as the child's "home base" for independent venturing forth into the world of people, things and interesting learning experiences. Thus the securely attached child communicates more successfully, achieves better in schools and is better prepared for the final challenges of the years at home with her family, the attainment of a sense of personal identity, the foundation for the achievements, family relationships and workplace relationships in adulthood.[8]

John Bowlby founded attachment theory in the context of his clinical studies of large numbers of children who had been separated abruptly from one or both of their parents. The

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[7] Erik H. Erikson, Identity, Youth & Crisis. (Norton Press, 1968).

Lisa J. Berber and Jude Cassidy, Relations among Relationships: Contributions from Attachment Theory and Research, *in* Handbook of Attachment: Theory, Research and Clinical Applications. 688-712 (J. Cassidy & P. Shaver, eds., Guilford Press, 1999).

[8] Berber and Cassidy, supra.

reasons varied from the English evacuation of children from the urban centers during World War II to death, divorce or illness in either parent or child. The effects of sudden loss of such an important relationship include depression, withdrawal from others and a lessening of engagement in the ordinary activities of daily life.

Children cut off from visitation with either parent may not manifest the extreme clinical reactions Bowlby observed, but problems nonetheless arise. Those who work with children of middle-school age and adolescents find that the ongoing process of separation-individuation that leads to identity formation can be derailed by a loss of an important relationship of attachment. These older children and adolescents may become preoccupied with doubts about the reliability of love, the idea that closeness is unsafe; or worse, the idea that they are not lovable after all. Such preoccupation inhibits engagement with the external world and the kind of exploring of different roles needed for the formation of a healthy sense of identity. This short-circuiting of the identity process will then result in an arrest of development so that the next move to success in adult relationships of intimacy is likely not to occur. In sum, the removal of an ongoing significant relationship with a psychological parent puts the child at risk of never developing a secure sense of identity and remaining wary of closeness, love and commitment.[9]

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[9] Jane Kroeger, Identity in Adolescence: The Balance Between Self and Other. *See especially* Chapter 3: *"Adolescence as a Second Individuation Process: Blos's Psychoanalytic Perspective and an Object Relations View"*. 46-79. (Routledge Press, 1989).

Mary Dozier et al., Attachment and Psychopathology in Adulthood *in* Handbook of Attachment Theory, Research, and Clinical Applications.

Our treasured institution of the family is under threat from many sources. As a result of this children are at risk. The most essential ingredient needed for family to be created and sustained over time is adult participants who are capable of loving and being loved, caring, and carrying out a long-term commitment, despite the inevitable frustrations of family life. Such adults are the product of loving, secure, and un-disrupted relationships with one or more psychological parents during their growing years. The protection of children's enduring relationships with those with whom they have intimate parent-child relationships is not only part of society's duty of care to individual children, but part of society's interest in preserving the institution of the family.

497-519. (J. Cassidy and P. Shaver, eds., Guilford Press, 1999).

II. THE CHILD'S RIGHT TO NURTURE IS A FUNDAMENTAL RIGHT PROTECTED BY THE UNITED STATES CONSTITUTION; THE STATE CANNOT DEPRIVE A CHILD OF THIS RIGHT WITHOUT AFFORDING THE CHILD DUE PROCESS OF LAW.

The United States Supreme Court has recognized on many occasions that a parent has a liberty interest in maintaining a filial relationship with his or her child. In In re Michael H., supra, 491 U.S., 110, 130, however it said that "[w]e have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here. . . ."

The Court, however, has virtually acknowledged such a fundamental right in two cases. In Levy v. Louisiana, supra, 391 U.S. 68, the issue was the right of illegitimate children to bring an action for wrongful death of their mother. But the Court wrote on a broader scale:

> [W]e have been extremely sensitive when it comes to basic civil rights [citations] and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. [Citations.] The rights asserted here involve the intimate, familial relationship between a child and his own mother. (391 U.S. at 71.)

In Smith v. Organization of Foster Families, 431 U.S., 816 (1977), the foster parents asserted that they and their children had a liberty interest in the maintenance of their

relationship. The Court noted that

> the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot(ing) a way of life" through the instruction of children [citation], as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. (431 U.S. at 844.)

The Court found, however, that the process afforded by the State of New York was sufficient to protect the appellants' constitutional rights. [10]

The best argument for such a liberty interest we have discovered is that presented in the California Court of Appeal opinion in In re Bridget R., supra, 41 Cal.App.4th 1483, 1502-1505, which we reproduce her in part for the convenience of the Court:

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[10] The Court considered the foster parents' rights to be diminished because, "unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere with, not a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements." (431 U.S. at 845.) In this respect the present case resembles the "earlier cases recognizing a right to family privacy," because the arrangement between appellant, respondent, and their children arose entirely apart from the power of the State.

An individual's many related interests in matters of family life are compelling and are ranked among the most basic of civil rights. (Quilloin v. Walcott (1978) 434 U.S. 246, 255, 98 S.Ct. 549, 554-55, 54 L.Ed.2d 511, 519-520; In re Marilyn H. (1993) 5 Cal.4th 295, 306, 19 Cal.Rptr.2d 544, 851 P.2d 826.) The United States Supreme Court has stated that "[t]he intangible fibers that connect parent and child have an infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." (Lehr v. Robertson (1983) 463 U.S. 248, 256, 103 S.Ct. 985, 990, 77 L.Ed.2d 614, 623.) The high court has explained that its decisions which accord federal constitutional protection to certain parental rights rest upon "the historic respect--indeed, sanctity would not be too strong a term--traditionally accorded to the relationships that develop within the unitary family." (Michael H. v. Gerald D. (1989) 491 U.S. 110, 123, 109 S.Ct. 2333, 2342, 105 L.Ed.2d 91, 106.)

Family rights are afforded not only procedural but also substantive protection under the due process clause. Santosky v. Kramer (1982) 455 U.S. 745, 753, 102 S.Ct. 1388, 1394-1395, 71 L.Ed.2d 599, "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."; Moore v. East Cleveland (1977)

431 U.S. 494, 502, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531, [local ordinance which limited occupancy of a dwelling unit to members of a nuclear family violated Due Process Clause]. Stanley v. Illinois (1972) 405 U.S. 645, 649, 92 S.Ct. 1208, 1211-1212, 31 L.Ed.2d 551, "[A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him...") (Meyer v. Nebraska, 262 U.S. 390, 399-401, 43 S.Ct. 625, 626-627, 67 L.Ed. 1042, 1045-1046 (1923), [law against teaching foreign languages in elementary schools did not serve sufficiently compelling public purpose to justify infringement of due process rights of students to acquire knowledge and of parents to control their children's education]. Substantive due process prohibits governmental interference with a person's fundamental right to life, liberty or property by unreasonable or arbitrary legislation. (Moore v. East Cleveland, supra, 431 U.S. at pp. 501-502, 97 S.Ct. at pp. 1936-1937; In re David B. (1979) 91 Cal.App.3d 184, 192-193, 154 Cal.Rptr. 63.) Legislation which interferes with the enjoyment of a fundamental right is unreasonable under the Due Process Clause and must be set aside or limited unless such legislation serves a compelling public purpose and is necessary to the accomplishment of that purpose. In other words, such legislation would be subject to a strict scrutiny standard of review. (Moore v. East Cleveland, supra, 431 U.S. at p. 499, 97 S.Ct. at pp. 1935-1936; Bates v. City

> of Little Rock (1960) 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480; Sherbert v. Verner (1963) 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965; see also Poe v. Ullman (1961) 367 U.S. 497, 547, 81 S.Ct. 1752, 1779, 6 L.Ed.2d 989, dis. opn. of Harlan, J.)

In re Bridget, supra, (41 Cal.App.4th at 1502-1503.)

Often parental rights and children's rights are symmetrical, and enforcing the parental right will protect the children. But when they come into conflict, the courts generally protect the right of the child over that of the natural parent. (Id. at 1504-1505, citing Lehr v. Robertson 463 U.S. at pp. 261-262 (1983); Quilloin v. Walcott 434 U.S. at p. 255 (1978.) Moreover, their rights of the children do not necessarily depend on the existence of a biological or marital relationship:

> The United States Supreme Court has stated that "[n]o one would seriously dispute" that familial interests and rights may attach to the emotional ties which grow between members of a de facto family. (Smith v. Organization of Foster Families (1977) 431 U.S. 816, 844, 97 S.Ct. 2094, 2109-2110, 53 L.Ed.2d 14.) Both high courts have recognized that such interests and rights may outweigh biological relationships under some circumstances. (Lehr v. Robertson, supra, 463 U.S. at p. 261, 103 S.Ct. at p. 2993; Quilloin v. Walcott, supra, 434 U.S. at p. 255, 98 S.Ct. at p. 554-555; Smith v. Organization of Foster Families, supra, 431 U.S. at pp.

> 843-844, 97 S.Ct. at pp. 2109-2110; Adoption of Michael H., supra, 10 Cal.4th at pp. 1057-1058, 43 Cal.Rptr.2d 445, 898 P.2d 891.) (Id. at 1505.)

In sum, we contend that a child has a liberty interest in the maintenance of a nurturing relationship important to the child's development and maturation. It is a fundamental interest, but not an absolute one; there may be circumstances in which there is a competing interest of a parent or of the state that also enters into the balance. But it is a sufficient interest to be protected by due process, and a state should not be permitted to establish and construe its law on visitation so that some children have no forum in which they can protect their liberty interest.

III. BY DENYING SOME CHILDREN THE RIGHT TO ENFORCE THEIR RIGHT TO NATURE BECAUSE OF THE MARITAL STATUS OR SEXUAL ORIENTATION OF THE PARENTS, A STATE DENIES SUCH CHILDREN THE EQUAL PROTECTION OF THE LAWS.

Levy v. Louisiana, supra, 391 U.S. 68, is the starting point. There was a long tradition, in Louisiana and throughout the common-law world, of discrimination against bastards. Louisiana asserted that this discrimination fostered the valid state policy of discouraging childbirth out of wedlock. But history and tradition notwithstanding, the Court unanimously rejected the notion that Louisiana's policy could be carried out by denying illegitimate children the rights given legitimate children.

The California policy in this case plainly favors legitimate children, who have no trouble finding a suitable form of action, and who can protect nurturing relationships upon a showing that this is in the best interests of the child. But the door is only partially open to illegitimate children; they still have a chance if the relationship they seek to preserve is with a natural or presumed parent. An illegitimate child seeking to preserve a significant relationship with an unrelated person who has performed the parental role — a typical situation in same-sex relationships — can only get into court if he or she is lucky enough to find some **other** basis for court jurisdiction.

In short, California recognizes the right of a child to the maintenance of attachment bonds, including bonds with a de facto or psychological parent. But it protects this right unequally, depending on the marital status of the adult parties or the happenstance of the existence of some proceedings -- a pre-existing guardianship, a juvenile court case, a dispute about paternity -- in which that right can be asserted. In the recurrent case of a lesbian relationship in which the child is raised as the child of both partners, it provides that child no means to protect his or her relationship with the de facto parent.

CONCLUSION

For the foregoing reasons, amici urge the Court to grant the petition for certiorari of petitioner Kathleen Crandall.

Respectfully submitted,

Michael Willemsen
Counsel for Amici